

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THE ESTATE OF YARON UNGAR, et al.,	:	
	:	
Plaintiff,	:	18 MS 0302
-against-	:	
	:	
THE PALESTINIAN AUTHORITY, et al.,	:	
	:	
Defendants,	:	
-and-	:	
	:	
M. NASSER AL-KIDWA, in his capacity as the	:	
head of the Permanent Observer Mission of	:	
Palestine to the United Nations, f/k/a the	:	
Permanent Observer Mission of the P.L.O. to the	:	
United Nations,	:	
Additional Party Receiving	:	
Notice of This Application.	:	
----- X		

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

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Preliminary Statement

The United States of America (the “United States” or the “Government”) respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517.¹ The United States’ interest in this matter arises from the foreign policy concerns directly implicated by Plaintiffs’ effort to enforce a monetary judgment by seeking the sale and eviction of the Palestinian Permanent Observer Mission to the United Nations, located in New York City (the “Observer Mission” or the “Palestinian Observer Mission”). The United States respectfully submits this Statement (i) to articulate the clearly established federal law that commits foreign policy decisions generally, and decisions concerning the operation of foreign missions in particular, to the Executive Branch; (ii) to note that decisions concerning the disposition of foreign missions are not well-suited to judicial resolution; and (iii) to communicate the strongly-held position of the Executive Branch that it is in the United States’ foreign policy interests to allow the Observer Mission to continue to operate without interference from Plaintiffs or, respectfully, from judicial process. Indeed, because of these foreign policy interests, the Executive has exercised its constitutional and legislatively delegated authority to allow the Observer Mission to operate from the property that it owns.

It is the express judgment of the United States that the relief requested by Plaintiffs would effectively prevent the Observer Mission from operating at a particularly sensitive moment, a result that would impair the ability of the Executive Branch to effectuate its foreign policy goals with respect to the Middle East Peace Process and at the United Nations. The granting of this

¹ That statute provides: “The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States” 28 U.S.C. § 517.

relief would therefore have grave implications for United States foreign policy. Nor are these foreign policy concerns allayed by Plaintiffs' suggestion that the Observer Mission may continue to function by renting space at another location or remaining at its current location in a lease-back arrangement. Recognizing precisely the foreign policy concerns triggered by the sale or acquisition of foreign mission property, Congress has specifically conferred authority over such transactions to the Secretary of State, pursuant to the Foreign Missions Act.

Accordingly, the United States respectfully requests that the Court examine this lawsuit not merely in the isolated light of Plaintiffs' attempt to enforce a judgment, but rather against the backdrop of American foreign policy. In consideration of the strong foreign policy interests at stake here, the United States asks that the Court dismiss this matter on any available legal ground.

Background

I. PROCEDURAL BACKGROUND

Plaintiffs Estate of Yaron Ungar et al. ("Plaintiffs") seek to enforce \$116 million judgments (the "Judgments") obtained in the United States District Court for the District of Rhode Island against the Palestinian Authority ("PA"), the Palestine Liberation Organization ("PLO"), and Hamas.² See Estates of Ungar and Ungar ex rel. Strachman v. Palestinian Authority, 325 F. Supp. 2d 15 (D.R.I. 2004), aff'd, 402 F.3d 274 (1st Cir. 2005). The Judgments result from a lawsuit brought by Plaintiffs pursuant to the Anti-Terrorism Act of 1991, 18 U.S.C. §§ 2331-2338, following the 1996 Hamas terrorist murder of Yaron Ungar, an American citizen,

² This Statement does not address the merits of the underlying litigation but rather only the particular remedies being sought here.

while living in Israel.³ See id. The Judgments were affirmed on appeal, see 402 F.3d 274 (1st Cir. 2005), and the PLO and PA have until October 17, 2005, to file a petition for certiorari with the United States Supreme Court.

On July 20, 2005, Plaintiffs sought by Order to Show Cause in Part I of this Court an order appointing a receiver, pursuant to N.Y. C.P.L.R. § 5228(a), to sell the real property located at 115 East 65th Street in New York City – the site of the Observer Mission – and to “eject” any individuals from its premises, with the proceeds of the sale paid to Plaintiffs and applied to the Judgments. Following several procedural adjournments memorialized in an order issued by Judge Laura Taylor Swain sitting in Part I on August 5, 2005 (the “August 5 Order”), Defendants submitted their opposition papers on August 4, 2005. In response to notification by the United States that it was considering submission of a Statement of Interest in this matter, the August 5 Order also set September 2, 2005 as the date for any such submission, with a hearing to be held on September 13, 2005 before Judge Colleen McMahon, who would then be sitting in Part I. Following a request by the United Nations for an adjournment of the hearing and an opportunity to be heard, Judge McMahon declined to adjourn the hearing date but allowed the United Nations to submit papers on or before noon on September 12, 2005. Judge McMahon also extended the time for the United States to submit this Statement of Interest until September 12, 2005.

II. SUBSTANTIVE BACKGROUND

A. The Headquarters Agreement

Underlying several of the issues raised by this lawsuit is an international agreement

³ The District Court dismissed claims arising from the death of Yaron Ungar’s wife since she was not alleged to be an American national. See id. at 15 n.1.

entered into by the United States and the United Nations on June 22, 1947, for the purpose of establishing the permanent headquarters of the United Nations in the United States. The Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations (known as the “Headquarters Agreement”) establishes the conditions necessary for the operation of the United Nations in the United States and otherwise regulates the relationship between the United States and the United Nations in connection with the operations of the United Nations within the United States. See Declaration of Danna Drori, dated September 12, 2005 (“Drori Dec.”), Exh. A (G.A. Res. 169 (II), 11 U.N.T.S. 11, No. 147 (1947); 61 Stat. 756, T.I.A.S. No. 1676, authorized by S.J. Res. 144, 80th Cong., 1st Sess., Pub. L. No. 80-347, set out in 22 U.S.C. § 287 (note)). As host country to the United Nations, the United States assumes specific obligations to ensure that the important business of the United Nations and the missions officially associated with it can be conducted and executed without interruption.⁴ Id.

B. United States Actions Toward The Observer Mission

The PLO established its Observer Mission in New York in 1974 shortly after the United Nations extended to it an invitation to “participate in the sessions and the work of the General

⁴ Section 11 of the Headquarters Agreement provides that United States federal, state and local authorities “shall not impose any impediments to transit to or from the headquarters district” by designated persons affiliated with the United Nations, including “persons invited to the headquarters district by the United Nations . . . on official business.” Id. (Headquarters Agreement, § 11). The United States is obligated to carry out Section 11 “irrespective of the relations existing between” the United States and the Section 11 beneficiaries. Id. (Headquarters Agreement, § 12). In addition, Section 13 of the Headquarters Agreement prohibits the United States from applying its laws and regulations concerning the entry and residence of aliens “in such manner as to interfere with the privileges referred to in Section 11.” Id. (Headquarters Agreement, §§ 13(a),(b)).

Assembly in the capacity of observer [to the United Nations].” See Drori Dec., Exh. B (G.A. Res. 3237, U.N. GAOR, 29th Sess., A/Res/3237 (1974)).⁵ Although the United States opposed the United Nations’ invitation at the time, it nevertheless honored it and allowed the PLO to establish an observer mission operating out of the premises at issue. Reflecting this policy, the United States in 1974 defended in court its authority to issue visas to PLO representatives, taking the position in an action for injunctive relief brought by the Anti-Defamation League that it was required to issue the visas under the Headquarters Agreement. See Anti-Defamation League v. Kissinger, No. 74 C 1545 (E.D.N.Y. 1974). In refusing Plaintiffs’ request that PLO representatives be denied visas, Judge Costantino took note from the bench of the United States’ “special responsibility” for providing access to the forum of the United Nations:

This problem must be viewed in the context of the special responsibility which the United States has to provide access to the U.N. under the Headquarters Agreement. It is important to note . . . that a primary goal of the U.N. is to provide a forum where peaceful discussion may displace violence as a means of resolving disputed issues. At times our responsibility to the U.N. may require us to issue visas to persons who are objectionable to certain segments of our society.

See Drori Dec., Exh. D (Subjects of International Law: International Organizations, 1974 Digest § 4(B), at 28).

Along with the execution of responsibilities owed to the United Nations, the United States has increasingly asserted administrative control over foreign missions to the United Nations, including the Palestinian Observer Mission. As discussed further below, see infra at 11-

⁵ In 1998, the United Nations conferred upon the PLO “additional rights and privileges of participation in the sessions and work of the General Assembly,” including the right to participate in general debate of the General Assembly. See Drori Dec., Exh. C (G.A. Res. 52/250, U.N. GAOR, 52nd Sess., A/Res/52/250 (1998)).

14 & 17-18, Congress passed the Foreign Missions Act, 22 U.S.C. § 4301 et seq. ("FMA"), in 1982, which authorized the Secretary of State to regulate such missions. The Secretary subsequently determined that various provisions of the FMA were specifically applicable to the permanent observer missions to the United Nations. See Drori Dec., Exh. E (Determinations Under the Foreign Missions Act, 49 Fed. Reg. 48,627 (Dec. 13, 1984)). Among those provisions was Section 205, 22 U.S.C. § 4305(a), which gave the Secretary various controls over the acquisition, disposition, or use of mission property, including a 60-day period to permit the Secretary to review proposals for all such property transactions.⁶ See id. at ¶ 1. By a note verbale dated January 19, 1983, the United States Mission to the United Nations informed permanent observer missions, including the Palestinian Observer Mission, of the Secretary's

⁶ Section 205, 22 U.S.C. § 4305, provides in relevant part:

(a) Proposed acquisition, sale, or other disposition

(1) The Secretary shall require any foreign mission . . . to notify the Secretary prior to any proposed acquisition, or any proposed sale or other disposition, of any real property by or on behalf of such mission. The foreign mission (or other party acting on behalf of the foreign mission) may initiate or execute any contract, proceeding, application, or other action required for the proposed action --

(A) only after the expiration of the 60-day period beginning on the date of such notification . . . ; and

(B) only if the mission is not notified by the Secretary within that period that the proposal has been disapproved; however, the Secretary may include in such notification such terms and condition as the Secretary may determine appropriate in order to remove the disapproval.

(2) For purposes of this section, "acquisition" includes any acquisition or alteration of, or addition to, any real property or any change in the purpose for which real property is used by a foreign mission.

22 U.S.C. § 4305(a).

determination, warning that “[n]on-compliance [with Section 205] could result in the Mission being required to divest itself, or forego the use of the property in question.” See Drori Dec., Exh. F (Note Verbale from the United States Mission to the United Nations to the Permanent Missions and Offices of the Permanent Observers to the United Nations (Jan. 19, 1983)). Section 205 also gave the Secretary the power to “require any foreign mission to divest itself of, or forego the use of, any real property.” 22 U.S.C. § 4305(b).

In 1983, the Secretary further extended to all United Nation missions, including the Palestinian Observer Mission, application of Section 204 of the FMA, 22 U.S.C. § 4304. See Drori Dec., Exh. E, at ¶ 2. Among other things, Section 204 enabled the Secretary to “require a foreign mission (A) to obtain benefits from or through the Secretary on such terms and conditions as the Secretary may approve, or (B) to forego the acceptance, use, or relation of any benefit” 22 U.S.C. § 4304(b). The Secretary subsequently issued a determination directing the Palestinian Observer Mission to “comply with certain conditions respecting travel and related services.” See Drori Dec., Exh. E, at ¶ 5.

Despite its assertion of control over property disposition, benefit provision, and travel conditions concerning the Palestinian Observer Mission, the Department of State has never exercised its discretion under the FMA to close the Observer Mission or to move it from its location at East 65th Street in New York City.⁷ To the contrary, the Secretary of State specifically

⁷ Although, as discussed further below, see infra at 25-27, the Executive Branch commenced a federal action in 1988 seeking injunctive relief to close the Palestinian Observer Mission, it did so based upon its belief that Congress had directed such an action under the Anti-Terrorism Act of 1987, 22 U.S.C. § 5201 et seq. (“ATA”). See United States v. Palestine Liberation Org. (“United States v. PLO”), 695 F.Supp. 1456 (S.D.N.Y. 1988); see also id. at 1470 n.35 & n.36 (noting the Department of State’s expressed position that closure of the Observer Mission would constitute a violation of the Headquarters Agreement). In any event, the

declined to close down the Observer Mission in 1986 when Congressman Jack Kemp requested such action following a terrorist attack in Jerusalem. Although Secretary of State George P. Schultz expressed his shared concern about the “claims of responsibility by elements of the PLO” for the Jerusalem attack and asserted that the Observer Mission is “in no sense accredited to the U.S.,” he explained that because the Observer Mission “represents the PLO in the U.N.,” the United States is “therefore . . . under an obligation [pursuant to the Headquarters Agreement] to permit PLO Observer Mission personnel to enter and remain in the United States to carry out their official functions at UN headquarters.” See Drori Dec., Exh. G (133 Cong. Rec. E1635-36 (1987)).

Notably, the decision to refrain from closing the Observer Mission in late 1986 stands in contrast to the Secretary’s decision in October 1987 to close down the Palestine Information Office, a foreign mission in Washington, D.C. not affiliated with the United Nations. Pursuant to both the Executive Branch’s Article II powers as well the authority delegated to him by the FMA, the Secretary ordered the Palestine Information Office to “divest itself of all real property” and to “cease operation as a mission representing the PLO because of U.S. concern over terrorism committed and supported by individuals and organizations affiliated with the PLO, and as an expression of our overall policy condemning terrorism.” See Drori Dec., Exh. H (Determination and Designation of Benefits Concerning Palestine Information Office, 52 Fed. Reg. 37,035 (Oct. 2, 1987)).

Court rejected injunctive relief, holding that neither the text of the ATA nor its legislative history manifested Congress’ intent to “abrogate” the United States’ obligations under the Headquarters Agreement and require closure of the Observer Mission. Id. at 1471; see also infra at 25-27. The United States took no further action against the Observer Mission.

More recently, and in order to facilitate the Middle East Peace Process, the United States allowed the PLO in 1994 to open an office in Washington, D.C., designating it a “foreign mission” within the terms of the FMA. See Drori Dec., Exh. I (Designation and Determination, 59 Fed. Reg. 37,121 (July 20, 1994)).⁸ Moreover, since 1994, and as discussed further below, the President has chosen to waive application to the Washington-based PLO mission of those ATA provisions that bar the establishment of a PLO office, both in order to advance the national security interests of the United States and to advance the peace process.⁹ See infra at 23 n.17.

Discussion

I.

FOREIGN POLICY DECISIONS GENERALLY AND DECISIONS REGARDING FOREIGN MISSIONS SPECIFICALLY ARE COMMITTED TO THE EXECUTIVE BRANCH

As discussed below, the Secretary of State has decided to allow the Palestinian Observer Mission to operate at its present location, and in so doing has exercised constitutional and statutory authorities that have vested that decision exclusively in the Executive Branch. The relief requested by the Plaintiffs would invariably upset that particular decision, and is impossible to reconcile with the constitutional and statutory scheme.

⁸ The designation was based in part upon the status of the PLO as “an organization representing a territory or political entity which has been granted diplomatic or other official privileges and immunities under the laws of the United States [by virtue of its status as an observer to the United Nations]” Id. (brackets in original).

⁹ No similar waiver has been issued for the Palestinian Observer Mission because another Judge of this Court has held that the ATA does not require closure of the Mission. See United States v. PLO, 695 F.Supp. at 1471.

A. In General, Decisions Concerning The Disposition Of Mission Real Property Are Confined By Statute And By The Constitution To The Executive Branch – And That Authority Has Here Been Exercised

The United States Constitution vests exclusive authority in the Federal Government, and substantial authority in the Executive Branch, regarding the conduct of foreign affairs. See, e.g., American Ins. Ass'n v. Garamendi, 539 U.S. 396, 413-14, 123 S. Ct. 2374, 2386 (2003) (citations omitted). In particular, the President's power under the Constitution to "make Treaties" and "appoint Ambassadors [and] other public Ministers" with the advice and consent of the Senate, art. II, § 2, cl. 2, and to "receive Ambassadors and other public Ministers," id. at § 3, together with the vesting of the "Executive Power" in the President, id. at § 1, cl. 1, confer upon the President his authority over foreign affairs. As the Supreme Court has recently reiterated, "the historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'" Garamendi, 539 U.S. at 414, 123 S. Ct. at 2386 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11, 72 S. Ct. 863, 897 (1952) (Frankfurter, J., concurring)). Indeed, "[w]hile Congress holds express authority to regulate public and private dealings with other nations in its war and foreign commerce powers, in foreign affairs the President has a degree of independent authority to act." Id. (citing Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 109, 68 S. Ct. 431, 435 (1948) ("The President . . . possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs.")); Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 188, 113 S. Ct. 2549, 2567 (1993) (the President has "unique responsibility" for the conduct of "foreign and military affairs").

The general commitment of foreign relations to the Executive Branch is reinforced in the particular area of foreign missions, where the Executive Branch acts not only pursuant to broad constitutional authority but also pursuant to express statutory authority. Specifically, Congress has conferred authority over the sale or acquisition of foreign mission property to the Executive; it did so precisely because such transactions necessarily implicate foreign policy concerns. Pursuant to the FMA, the Secretary of State is charged with determining the “treatment to be accorded to a foreign mission in the United States.” 22 U.S.C. § 4301(c). In acting pursuant to the FMA, the Secretary of State is directed to give due consideration not only to the treatment accorded to United States missions abroad but also to matters of foreign policy and national security, *i.e.*, “matters relating to the protection of the interests of the United States.” *Id.*; *see also* 22 U.S.C. § 4301(b). The FMA bestows upon the Secretary broad and substantial authority to, for example, regulate the provision of benefits to missions, *see* 22 U.S.C. § 4304, and to require a mission to divest itself of real property where “necessary to protect the interests of the United States,” 22 U.S.C. § 4305(b).

As noted above, *see supra* at 6-7 & n.6, and of particular relevance here, the FMA also authorizes the Secretary to approve or disapprove any acquisition or disposition of property of foreign missions. *See* 22 U.S.C. § 4305(a)(1) (requiring foreign missions to notify the Secretary of “any proposed acquisition, or any proposed sale or other disposition, of any real property by or on behalf of such mission” and bestowing upon the Secretary the power to determine whether or not to allow such actions). Decisions made pursuant to the FMA, including Section 4305(a), are expressly committed to the Secretary’s discretion, which is deliberately very broad under this statute. *See* 22 U.S.C. § 4308(g) (“Except as otherwise

provided, any determination required under this chapter shall be committed to the discretion of the Secretary.”); see also 22 U.S.C. § 4302(b) (determinations of the “meaning and applicability” of terms used in the FMA “shall be committed to the discretion of the Secretary”).

In enacting the FMA, Congress was acutely aware that it was legislating in the field of foreign affairs, where the Executive Branch is preeminent and where expertise and political judgment are essential. Because the Secretary of State makes decisions about foreign missions with express congressional authorization pursuant to the FMA, she “exercises not only [the executive] powers but also those delegated by Congress.” Dames & Moore v. Regan, 453 U.S. 654, 668, 101 S. Ct. 2972, 2981 (1981). Her actions are therefore “supported by the strongest of presumptions and the widest latitude of judicial interpretation,” with the “burden of persuasion . . . rest[ing] heavily upon any who might attack [them].” Id. (quoting Youngstown, 343 U.S. at 637, 72 S. Ct. at 871) (Jackson, J., concurring)); see also Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363, 381, 120 S. Ct. 2288, 2298 (2000) (“Congress’s express command to the President to take the initiative for the United States among the international community invested him with the maximum authority of the National Government[.]”) (citation omitted); Palestine Information Office v. Shultz, 853 F.2d 932, 937 (D.C. Cir. 1988) (“If the authority accorded the executive branch when acting pursuant to a congressional grant of power is great, it is greater still in the case at bar because the Secretary was acting in the field of foreign affairs.”).

Clearly, the FMA does not automatically preclude the routine application of state and local laws that might place incidental burdens on foreign missions; at the same time, the

Secretary's discretion to exercise statutory authority, together with independent constitutional authority exercisable by the Executive Branch, was expressly preserved. Cf. 22 U.S.C. § 4307 (providing that certain statutory provisions do not, of their own accord, preempt zoning, land use, health, safety, or welfare laws and authority, but that "a denial by the Secretary involving a benefit for a foreign mission within the jurisdiction of a particular State or local government shall be controlling"). Whatever the difficulty of reconciling state and local regulatory authority with the Secretary's authority in the abstract, the conflict posed by the Plaintiffs' desired remedy is patent. Since the enactment of the FMA, the Secretary of State, exercising constitutional and statutory authority vested in the Executive Branch and in her office, has permitted the Palestinian Observer Mission to operate in New York City in property which it owns. See Drori Dec., Exh. J, at 2 (Letter from Department of State Legal Advisor to Assistant Attorney General, Civil Division, Department of Justice, dated September 7, 2005). Were the Observer Mission to seek to dispose of that property itself – even to satisfy a monetary judgment obtained against it, in preference to employing other assets – the Secretary's permission would have to be obtained before any transaction could be completed. See 22 U.S.C. § 4305(a)(1). The fact that Plaintiffs seek to make that decision on the Observer Mission's behalf does not minimize the inconsistency with the Secretary's authority, and indeed accentuates it. On their theory, a subsequent decision by the Secretary to permit the Observer Mission to acquire new property – which would be realized by a decision not to disapprove such acquisition within the 60-day statutory period provided for by 22 U.S.C. § 4305(a)(1)(A)¹⁰ – would equally be subject to attack, until such point as Plaintiffs' judgments

¹⁰ See supra at 6 n.6 (text of 22 U.S.C. § 4305).

(and any others) were fully satisfied. Appointing a receiver risks setting in motion a process by which the Secretary of State's delicate judgments are repeatedly overridden.

The significant injury this relief poses to the United States' foreign policy interests is described in Part II, infra. It is evident, in any event, that it is impossible simultaneously to maintain the Secretary's decision to permit the Observer Mission to own and operate at the specified location that Plaintiffs seek to attach, and at the same time afford Plaintiffs the relief they seek. Under such circumstances, when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," it may not be applied. Crosby, 530 U.S. at 373, 120 S. Ct. at 2294 (quoting Hines v. Davidowitz, 312 U.S. 52, 67, 61 S. Ct. 399, 404 (1941)); see, e.g., Wachovia Bank, N.A. v. Burke, 414 F.3d 305 (2d Cir. 2005) (National Bank Act and regulations issued by the Office of the Comptroller of the Currency preempt state banking laws concerning operating subsidiaries of nationally chartered banks).¹¹ The evidence is "more than sufficient to demonstrate" that the requested relief "stands in the way of [the Federal Government's] diplomatic objectives." Crosby, 530 U.S. at 386, 120 S. Ct. at 2301 (citing conflicts with Congressionally-specified objectives);

¹¹ Although the Anti-Terrorism Act of 1991, 18 U.S.C. §§ 2331-2338, the statute under which Plaintiffs brought their underlying lawsuit against Defendants in the District of Rhode Island, authorizes damage awards for certain acts of international terrorism, see id. at § 2333(a), it does not mandate a mechanism by which every such award shall be enforceable. Nor does any other provision of federal law authorize in these circumstances the relief requested. Federal Rule of Civil Procedure 69(a) directs federal courts to apply state process to the execution of monetary judgments only to the extent that state process does not conflict with a federal statute. See Fed. R. Civ. P. 69(a) ("Process to enforce a judgment for the payment of money . . . shall be in accordance with the practice and procedure of the state in which the district court is held . . . except that any statute of the United States governs to the extent that it is applicable."); see also Schneider v. National R.R. Passenger Corp., 72 F.3d 17, 19 (2d Cir. 1995) ("if there is an applicable federal statute, it is controlling") (citations omitted).

accord Garamendi, 539 U.S. at 427, 123 S. Ct. 2393 (citing conflicts with Presidential diplomatic objectives).

B. In General, Decisions Regarding The Disposition Of Foreign Missions Are Not Suited To Judicial Resolution – As Particularly Evident In This Matter

Recognizing the constitutional commitment of foreign affairs to the Executive Branch, courts have long accorded the Executive Branch the “utmost deference” in matters involving the conduct of foreign affairs. See, e.g., Dep’t of the Navy v. Egan, 484 U.S. 518, 529-30, 108 S. Ct. 818, 825 (1988) (“The Court . . . has recognized the generally accepted view that foreign policy was the province and responsibility of the Executive. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.”) (citations and quotation marks omitted). Indeed, the Supreme Court has held that “[m]atters relating to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.” Regan v. Wald, 468 U.S. 222, 242, 104 S. Ct. 3026, 3038 (1984) (referring also to the “classical deference to the political branches in matters of foreign policy”) (citation and quotation marks omitted); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320, 57 S. Ct. 216, 221 (1936) (recognizing “the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations”).¹² As noted by another Judge of this Court, the “conduct of the foreign relations of our

¹² See also United States v. Pink, 315 U.S. 203, 222-23, 62 S. Ct. 552, 562 (1942) (The “conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government; [and] . . . the propriety of the exercise of that power is not open to judicial inquiry”) (citation omitted); Palestine Information Office, 853 F.2d at 942 (“[O]ur deference to the State Department on questions of foreign policy is great.”) (citing Haig v. Agee, 453 U.S. 280, 292, 101 S. Ct. 2766, 2774 (1981)).

Government is committed by the Constitution to the executive and legislative – the ‘political’ – departments of the government.” United States v. Palestine Liberation Org. (“United States v. PLO”), 695 F. Supp. 1456, 1463 (S.D.N.Y. 1988). “It is thus beyond the authority of the courts to interfere with the Executive Branch’s foreign policy judgments.” In re Austrian and German Holocaust Litig., 250 F.3d 156, 164 (2d Cir. 2001).

This deference is due, in no small part, to the understanding that “[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.” Haig, 453 U.S. at 292, 101 S. Ct. at 2774. The Supreme Court has acknowledged that courts are not capable of “determining precisely when foreign nations will be offended by particular acts,” and that the “nuances” of United States foreign policy “are much more the province of the Executive Branch and Congress” than that of the courts. Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159, 194, 196, 103 S. Ct. 2933, 2955, 2956 (1983); see also Crosby, 530 U.S. at 386, 120 S. Ct. 2301 (same). Judicial pronouncements in areas touching on foreign policy may also disrupt the “concern for uniformity in this country’s dealings with foreign nations that animated the Constitution’s allocation of the foreign relations power to the National Government in the first place.” Garamendi, 539 U.S. at 413, 123 S. Ct. at 2386 (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427, n.25, 84 S. Ct. 923, 940 n.25 (1964), and citing Crosby, 530 U.S. at 381-82 n.16, 120 S. Ct. at 2299 n.16); see First Nat’l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 769, 92 S. Ct. 1808, 1814 (1972) (plurality opinion) (explaining that act of state doctrine was “fashioned because of fear that adjudication would interfere with the conduct of foreign relations”); Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 449,

99 S. Ct. 1813, 1822 (1979) (noting that dormant Foreign Commerce Clause doctrine protects the National Government's ability to "speak with one voice" in regulating commerce with foreign nations) (citation omitted).

Mindful of these concerns, courts construing the FMA have regarded the types of decisions at issue here as confined to the Executive Branch. As the District of Columbia Circuit noted, "[w]hen exercising its supervisory function over foreign missions [as it does pursuant to the FMA], the State Department acts at the apex of its power." Palestine Information Office, 853 F.2d at 937; see also id. at 934 (holding that the "wisdom of the government's decision" to close the Palestine Information Office under the FMA is "not at issue" because "[s]uch policy questions are firmly lodged in the political branches of government").¹³ In enacting the FMA, Congress explicitly committed "discretionary authorities" to the Secretary in order "to provide the flexibility, which the Department of State has not heretofore possessed, to enable the Secretary to decide which sanction or other response is most appropriate to solve a specific problem." See Drori Dec., Exh. K (H.R. Rep. No. 97-102, pt. 1 ("H.R. Rep. No. 97-102"), at 28 (1981)). Congress' determination to commit these matters to the Secretary's discretion is not only clear from the plain language of the FMA, see, e.g., 22 U.S.C. §§ 4308(g), 4302(b), but also reflects a legislative understanding of the international impact that the Secretary's determinations may have on the

¹³ The Palestine Court clearly held that it could not question the Secretary's policy decision made pursuant to the FMA, but it did undertake to review the impact of that decision on appellants' constitutional rights. See 853 F.2d at 934, 939-43. Such review, however, is not warranted here, where Plaintiffs have alleged no constitutional harms. In any event, the Palestine court determined that the foreign policy interests at stake in the Secretary's decision to close down the Palestine Information Office outweighed any "incidental impact" on appellants' constitutional rights. Id. at 934; see also id. at 942-43 (applying lower threshold to due process considerations where foreign policy interests at stake).

United States' relations abroad and of the paramount need for the United States to speak with "one voice" in this area. Crosby, 530 U.S. at 380-82 & n.16, 120 S. Ct. at 2298-99 & n.16. In noting that Section 4302(b) commits the "interpretation and application" of the terms in Section 4302(a) to the Secretary's discretion, the House Report observed: "The provision is intended to avoid conflicting interpretations by different government agencies and courts and potential litigation that might detract from the efficient implementation of this title or might adversely affect the management of foreign affairs." See Drori Dec., Exh. K (H.R. Rep. No. 97-102, at 30) (emphasis supplied); see also id. at 40 ("Section 208(g) [22 U.S.C. § 4308(g)] parallels the provisions of section 202(b) [22 U.S.C. § 4302(b)] with respect to the authority of the Secretary to make determinations. This is necessary to avoid inconsistent interpretations or policies.").

The unsuitability of judicial pronouncements on matters of delicate foreign relations is, if anything, magnified by the nature of the inquiry at issue in this matter. Plaintiffs seek a determination from the Court as to the disposition of a foreign mission – a determination that is not only confined in the Secretary of State by Congress pursuant to the FMA, but which, when made by the Secretary, involves the weighing of a wide range of policy factors, including foreign policy factors, that are the province of the Executive Branch. Those factors include, as a general matter, whether a mission should be permitted to open or made to close; how best to implement United States obligations under international agreements; the requirements of diplomatic and foreign relations, in light of current events, with all affected nations and international organizations; the benefits of making comparable and consistent decisions with regard to foreign missions; the domestic security interests of the United States;

and the practical feasibility or infeasibility of alternative options. See Drori Dec., Exh. J, at 3. Nor is the unsuitability of judicial pronouncements in this area alleviated by Plaintiffs' suggestion that the Court determine instead whether the Observer Mission could, assertedly, "make a simple and easy move" to rented space at another location in the headquarters district or retain its current location with a permanent lease-back provision. See Plaintiffs' Reply Memorandum of Law ("Plaintiffs' Reply") at 12-14. To the contrary, the very determination of whether the Observer Mission might conceivably operate under different conditions – even ignoring the pregnant possibility that the Plaintiffs, and the receiver, might pursue and foreclose those opportunities seriatim until the prior judgments were fully satisfied – necessarily implicates both the wide range of policy factors which are uniquely in the province of the Executive Branch¹⁴ as well as the serious United States foreign policy and national security concerns discussed in the next section, see infra at Part II.¹⁵

Under analogous circumstances implicating the separation of powers, courts have been careful to avoid intruding upon the prerogatives of the Executive Branch. See, e.g., Dep't of

¹⁴ Courts have invoked some of these same types of factors and considerations in declining to act in a variety of other contexts. Cf. Baker v. Carr, 369 U.S. 186, 217, 82 S. Ct. 691, 710 (1962) (citing, as relevant elements, when there is a "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question"); Can v. United States, 14 F.3d 160, 162 (2d Cir. 1994).

¹⁵ Plaintiffs also argue that the Observer Mission could operate from the home of the Observer. See Plaintiffs' Moving Memorandum of Law at 6. However, the Mission already functions as both the Observer Mission and the residence of its Observer, the head of Mission. See Drori Dec., Exh. J, at 2.

the Navy, 484 U.S. at 529-30, 108 S. Ct. at 825; Regan, 468 U.S. at 242-43, 104 S. Ct. at 3038. Under the facts at issue here, given the Secretary of State's decisions in furtherance of constitutional and statutory authority plainly implicating political and foreign policy expertise of the greatest delicacy, the discretionary remedy sought by the Plaintiffs should not be granted, and the matter dismissed on any available legal ground.

II.

THE FOREIGN POLICY INTERESTS OF THE UNITED STATES

In the exercise of its constitutional and legislatively delegated authority, the United States considers and has considered it to be in the foreign policy interests of the United States to allow the PLO to continue to own and operate its observer mission at the current location in New York City. See Drori Dec., Exh. J; see also supra at 4-9 (background section). It is the express judgment of the United States that the relief sought by Plaintiffs in this matter would effectively prevent the Mission from operating by interfering with its ability to conduct its business with the United Nations at a crucial moment in the Middle East Peace Process. See Drori Dec., Exh. J, at 2-4. This result would significantly and negatively affect the United States' foreign policy objectives and would seriously disrupt and contravene the well-recognized authority of the Executive to determine and guide American foreign policy. Id. Moreover, these same concerns attach to Plaintiffs' proposal that the Observer Mission can make a "simple and easy move" to another location or lease from an as-yet unidentified landlord. See Plaintiffs' Reply at 12-14. Indeed, as discussed above, see supra at Part I, the FMA bestowed upon the Secretary the authority to review any sale, purchase, or lease of property by missions precisely because of both the inextricable connection of such issues to

matters of foreign policy and the unsuitability of those issues to judicial management.

A. The Relief Requested By Plaintiffs Would Seriously Undermine The United States' Foreign Policy Goals For The Middle East

As a preliminary matter, it is the judgment of the United States that the relief requested by Plaintiffs “would have a negative impact at an extraordinarily sensitive moment in the negotiations to resolve the Middle East conflict.” Drori Dec., Exh. J, at 3. The United States is deeply involved at the highest levels in promoting a “Roadmap to a Permanent Two State Solution to the Israeli-Palestinian Conflict,” which articulates a vision of the development of “an independent, democratic, and viable Palestinian state living side by side in peace and security with Israel and its other neighbors.” See Drori Dec., Exh. L (Press Release, United States Department of State, A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict (Apr. 30, 2003)).¹⁶ The United States has a national security interest in helping Israel and the Palestinians end the ongoing violence and move forward with negotiations. See Drori Dec., Exh. J, at 3-4. Encouraging both the new Palestinian leadership and ongoing reform of Palestinian institutions is a key component of the United States’ strategy for peace in that region. Id. at 3. A just, lasting, and comprehensive peace between Israel and its neighbors has been a long-standing foreign policy goal of the United States in the Middle East, and the United States must maintain its ties and contacts with all sides in order to advance that goal. Id. After four years of violence, recent actions taken by Israel to disengage its forces and withdraw its civilians from the Gaza Strip

¹⁶ The Roadmap was endorsed by resolution of the Security Council of the United Nations in 2003. See Drori Dec., Exh. M (S.C. Res. 1515, U.N. GAOR, 58th Sess., 4862nd mtg., S/Res/1515 (2003)). It is sponsored by a “Quartet” of international actors – the United States, the European Union, the Russian Federation, and the United Nations.

and parts of the West Bank have created a promising opportunity for renewed efforts to implement the Roadmap and achieve its central goals. Id. at 3-4.

In promoting implementation of the Roadmap, it is crucial for the United States to have clear channels of communication with both parties and to retain their confidence. Id. at 4. It is the judgment of the United States that the proposed dispossession of the Palestinian Observer Mission of the premises in which it has been operating for more than 30 years, at a time when both the PLO and the Palestinian Authority have new, moderate leadership in the person of Mahmoud Abbas, would disrupt an important line of communication and would likely be perceived as signaling a lack of United States support for the new leadership. Id. As a result, it could undermine Palestinian confidence in the United States at an especially delicate time in the peace process. Id.

Moreover, a functioning Palestinian Observer Mission serves United States foreign policy interests because the United Nations itself is one of the four members of the "Quartet" sponsoring the Roadmap, and as such plays a key role in international efforts to promote a peaceful resolution of the Israeli-Palestinian dispute. Id. The United Nations serves as a forum for broader efforts and discussions concerning the peace process. Id. For that process to succeed, it is the judgment of the United States that the Palestinians must be allowed to participate unhindered in the United Nations forum. Id. If the United States Government is seen to obstruct the ability of the Palestinians to engage in the United Nations discussions, the ability of the United States to effectively promote the peace process will be undermined. Id. The PLO, and likely the international community at large, would regard this action as a breach of our international obligations and an effort to marginalize the Palestinian voice at the United

Nations. Id. The result would be reduced influence by the United States over events of vital national security importance at a most sensitive time.¹⁷ Id.

Accordingly, for all of these reasons, it is the position of the United States that the relief sought by Plaintiffs would interfere with the Executive Branch's ability to pursue vital foreign policy objectives in the Middle East.

B. The Relief Requested By Plaintiffs Would Interfere With The United States' Relationship With The United Nations

It is also the United States' position that an order evicting the Observer Mission "would . . . cause serious embarrassment to the United States in its relations with the United Nations." Drori Dec., Exh. J, at 3. While the United Nations has not yet expressed its position in this matter, the United States anticipates that the United Nations would regard any order from this Court depriving the Observer Mission of its property as a violation of the

¹⁷ That the Executive Branch considers the continuing operation of PLO missions in the United States to be in the country's national security interest is evident in the President's decision again this year to waive the application of Section 5202 of the ATA to the PLO office in Washington, D.C. Section 5202 makes illegal the receipt of benefits from the PLO, expenditure of funds from the PLO, or establishment of offices or other facilities at the direction of the PLO. See 22 U.S.C. § 5202 (codified as Section 1003 of Pub. L. No. 100-204). The memorandum of justification accompanying the President's waiver underscored the importance of the Middle East peace process "to the national security interests of the United States" and stated that Section 5202 would "interfere[] with the operation and funding" of the PLO office in Washington, D.C., and "thus hinder[] our efforts to assist the parties to combat terror and take steps to promote . . . peace." See Drori Dec., Exh. N (Justification Statement for Waiver of Public Law 100-204, Section 1003 [22 U.S.C. § 5202], dated April 14, 2005); see also id. ("I hereby determine and certify that it is important to the national security interests of the United States to waive the provisions of section 1003 of the Anti-Terrorism Act of 1987, Public Law 100-204."). Although a similar waiver has not been issued for the mission at the United Nations because another Judge of this Court has held that the ATA does not require closure of the Observer Mission, see United States v. PLO, 695 F.Supp. at 1471, the Washington mission waiver is nevertheless highly relevant because the undisturbed operation of the Observer Mission is similarly regarded by the Executive Branch to be important to United States national security interests. See Drori Dec., Exh. J at 3-4; see also infra at 21-23.

United States' obligations under the Headquarters Agreement. See id. (noting the likelihood of a United Nations General Assembly condemnation of any forced sale of property and the possibility that it will seek an advisory opinion from the International Court of Justice that the forced sale contravenes United States obligations under the Headquarters Agreement).

Indeed, the General Assembly of the United Nations previously took the position that closure of the Observer Mission would violate the Headquarters Agreement. In reaction to the proposed passage of the Anti-Terrorism Act of 1987, 22 U.S.C. § 5201 et seq. ("ATA"), whose terms the United Nations construed to require closure of the Observer Mission, the General Assembly adopted Resolution 42/210(B) by which it "[r]eiterate[d] that the [Observer Mission] is covered by the provisions of the [Headquarters Agreement]" and requested that the United States "abide by its treaty obligations under the Headquarters Agreement and . . . refrain from taking any action that would prevent the discharge of the official functions of the" Observer Mission. See Drori Dec., Exh. O (G.A. Res. 42/210B, U.N. GAOR, 42nd Sess., A/Res/42/210B (1987)). The Resolution reflected also the position of the Secretary General: "The members of the [Palestinian Observer Mission] are . . . invitees to the United Nations. As such, they are covered by sections 11, 12 and 13 of the Headquarters Agreement of 26 June 1947." Id. (quoting Statement of the Secretary General of the United Nations, dated October 22, 1987).

The United Nations' position on the Headquarters Agreement is especially relevant to the United States' foreign policy interests because Section 21 of the Headquarters Agreement provides that any dispute between the United States and United Nations "concerning the interpretation or application of" the Headquarters Agreement "shall be referred for final

decision to a tribunal of three arbitrators” who shall “render a final decision.” See Drori Dec., Exh. A (Headquarters Agreement, § 21); see also Drori Dec., Exh. P (Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, 1988 I.C.J. 12, 26-27, 35 (Apr. 26) (advisory opinion from International Court of Justice that United States and United Nations were “under an obligation . . . to enter into arbitration” in order to resolve a dispute concerning the interpretation/application of the Headquarters Agreement)). If this Court were to grant Plaintiffs’ request and order the sale of the Observer Mission, there is a distinct possibility that the United Nations would call for international arbitration with the United States pursuant to Section 21 of the Headquarters Agreement. See Drori Dec., Exh. J, at 3. The United States would then have to submit to international arbitration – or refuse to do so and risk further conflict with the United Nations – and to confront the political and legal quagmire that would result if the arbitrators rendered a decision in favor of the United Nations.

In that regard, the United States respectfully calls the Court’s attention to United States v. PLO, 695 F. Supp. 1456 (S.D.N.Y. 1988), in which Judge Palmieri of this Court concluded that closure of the Observer Mission would violate the Headquarters Agreement because it would interfere with and impair the Mission’s ability to carry out its functions as an invitee of the United Nations. Id. at 1471. United States v. PLO is a case that arose in connection with the 1988 passage of the ATA, which, among other things, forbade the establishment or maintenance of “an office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States at the behest or direction of, or with funds provided by the” PLO “notwithstanding any provision of law to the contrary.” 22 U.S.C. § 5202(3).

When the PLO failed to comply with the ATA by closing its Observer Mission, the United States sought injunctive relief to force compliance. See United States v. PLO, 695 F. Supp. at 1460-61. Judge Palmieri dismissed the Government's lawsuit, holding that the ATA was not intended to apply to the Observer Mission because of the Headquarters Agreement, and therefore could not be used to close the Mission.¹⁸ Id. at 1471 ("The ATA and its legislative history do not manifest Congress' intent to abrogate th[e] obligation" of the United States under the Headquarters Agreement to "refrain from impairing the function of the PLO Observer Mission.") (emphasis supplied).

In the course of his decision, Judge Palmieri performed an exhaustive review of both United States practice under the Headquarters Agreement and statements made by the Executive Branch concerning the United States' obligations under the Headquarters Agreement. For example, he observed that "there can be no dispute that over the forty years since the United States entered into the Headquarters Agreement it has taken a number of actions consistent with its recognition of a duty to refrain from impeding the functions of observer missions to the United Nations." Id. at 1466 (noting also that the "United States has, for fourteen years [since the establishment of the Observer Mission in 1974], acted in a manner consistent with a recognition of the PLO's rights in the Headquarters Agreement"). Moreover, after citing various statements made by the Department of State and the United States' representative to the United Nations, Judge Palmieri concluded that "[i]t seemed clear

¹⁸ Although Section 11 of the Headquarters Agreement does not specifically refer to missions, Judge Palmieri noted both that the rights afforded under Section 11 "could not be effectively exercised without the use of offices" and that the Department of State had "at no time disputed the notion that the rights of entry, access and residence guaranteed to invitees [under Section 11] include the right to maintain offices [*i.e.*, missions]." United States v. PLO, 695 F. Supp. at 1465-66.

to those in the executive branch that closing the PLO mission would be a departure from the United States' practice in regard to observer missions" Id. at 1467 (citing, among others, a statement by the United States' representative that "closing the mission, in our view, and I emphasize this is the executive branch, is not consistent with our international legal obligations under the Headquarters Agreement"). Judge Palmieri further noted that both Secretary of State George P. Shultz and the Honorable Abraham Sofaer, Department of State Legal Adviser, had expressed their views that closure of the Observer Mission would violate the Headquarters Agreement. See id. at 1470 n.35 (1987 letter from Secretary Shultz to unnamed Senators and Congressman averring that "[a]s far as the closure of the PLO Observer Mission is concerned, this would be seen as a violation of a United States treaty obligation under the United Nations Headquarters Agreement"); id. at 1470 n.36 (1988 quote in the New York Times attributed to Judge Sofaer that it is "our judgment that the Headquarters Agreement as interpreted and applied would be violated" by the ATA). All of this together led Judge Palmieri to hold that the "language, application and interpretation of the Headquarters Agreement lead us to the conclusion that it requires the United States to refrain from interference with the PLO Observer Mission in the discharge of its functions at the United Nations." Id. at 1468 (emphasis supplied).¹⁹

¹⁹ Judge Palmieri also noted that Section 21 of the Headquarters Agreement applies to the resolution of disputes between the United Nations and the United States, but that he could not order the United States to submit to arbitration because, among other reasons, "the ultimate decision as to how the United States should honor its treaty obligations with the international community is one which has, for at least one hundred years, been left to the executive to decide." Id. at 1462-63; see also Drori Dec., Exh. Q (The Conference Report on the Foreign Missions Act, H.R. Conf. Rep. No. 693, at 43 (1982), reprinted in 1982 U.S.C.C.A.N. 691, 705) ("Of course, State and local governments are obliged to respect the rights of foreign missions to be granted certain benefits under international law and international agreements in force. The views of the Secretary of State on the requirements of international law are authoritative in this regard.").

* * *

Accordingly, because decisions concerning foreign missions are both constitutionally and legislatively committed to Executive Branch as a matter of federal law, because the Executive Branch has concluded that it is in the United States' interest to allow the Palestinian Observer Mission to operate from the property that it owns, and because the requested relief would interfere with the Executive Branch's foreign policy objectives, the United States respectfully submits that the Court should give great weight to the United States' foreign policy interests here and dismiss this matter. See, e.g., Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2766 n.21 (2004) (where the United States offers its opinion on matter of foreign policy, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy"); Republic of Austria v. Altmann, 541 U.S. 677, 702 124 S. Ct. 2240, 2255 (2004) (where United States files a statement of interest concerning the exercise of jurisdiction over foreign sovereigns, "that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy").

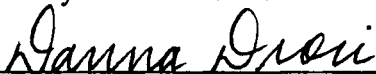
Conclusion

For the reasons stated above, the United States respectfully requests that the Court dismiss this matter.

Dated: New York, New York
September 12, 2005

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CERTIFICATE OF SERVICE

I, Danna Drori, an Assistant United States Attorney for the Southern District of New York, hereby certify that on September 12, 2005, I caused a copy of the foregoing Statement of Interest of the United States of America to be served by facsimile and by messenger to:

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